YUSMARIN SAMSUDIN *a*

v.

PP

COURT OF APPEAL, KUALA LUMPUR *b*
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: W-05-49-97]
20 AUGUST 1999 *c*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Whether ingredients proved - Presence of dangerous drugs in car driven by accused - Whether sufficient per se to constitute trafficking - Whether only supported lesser offence of possession - Dangerous Drugs Act 1952, ss. 12(2), 39A(2)(f), 39B(1)(a)* *d*

CRIMINAL PROCEDURE: *Sentence - Possession of cannabis - Dangerous Drugs Act 1952, ss. 12(2) & 39A(2)(f) - Cannabis weighing 2863.1 grams - Appropriate sentence*

The appellant was convicted by the High Court for trafficking in 2863.1 grams of cannabis in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and was sentenced to death. The conviction was premised *inter alia* upon the fact that the offensive drugs were found unconcealed on the back seat of the car that the appellant was driving. The appellant appealed against his conviction and sentence, and before the appellate court questions arose as to: (i) whether the evidence only supported a lesser offence of possession; and if so (ii) whether a deterrent sentence was called for, notwithstanding that the appellant was a first offender and 29 years old at the material time. *e* *f*

Held: *g*
Per Siti Norma Yaakob JCA

[1] In the light of the circumstanstial evidence adduced, the trial judge had misdirected himself in ruling that trafficking had been proved. Presence of the drug in the car, *per se*, cannot amount to trafficking. The evidence as adduced by the prosecution merely supported the lesser offence of possession under s. 12(2) of the Act. *h*

[2] The severity of the sentence prescribed in s. 39A(2)(f) of the Act reflected Parliament's intention that conviction for being in possession of a large amount of any form of prohibited drugs must be commensurate with the sentence to be passed based on the peculiar facts of each case. *i*

[3] The cannabis found in the possession of the appellant is 14 times the permitted limit for the presumption of trafficking to arise under s. 37(da)(vi) of the Act. That being so public interest dictates that he should be severely punished as a deterrent to others. A sentence of 18 years' imprisonment and 12 strokes of the rotan is just and appropriate in the circumstances.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di Mahkamah Tinggi perayu telah disabit kerana mengedar 2863.1 gram ganja bersalahan dengan s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), dan telah dihukum mati. Sabitan antara lain adalah berasaskan fakta bahawa dadah tersebut dijumpai dalam keadaan tidak tersorok ditempat duduk belakang kereta yang dipandu oleh perayu. Perayu merayu terhadap sabitan dan hukuman, dan di hadapan mahkamah rayuan persoalan berbangkit berhubung (i) samada keterangan hanya menyokong kesalahan memiliki yang lebih ringan; dan jika begitu (ii) samada satu hukuman berat wajar dijatuhkan walaupun perayu adalah pesalah kali pertama dan berumur 29 tahun pada waktu material.

Diputuskan:

Oleh Siti Norma Yaakob HMR

[1] Mengambilkira keterangan circumstantial yang dikemukakan, hakim bicara tersilap arahan apabila memutuskan bahawa perbuatan mengedar telah dibuktikan. Kehadiran dadah berkenaan di dalam kereta, *per se*, tidak menjadikan perayu seorang pengedar. Keterangan seperti yang dibentang oleh pendakwaan hanya menyokong kesalahan memiliki yang lebih ringan di bawah s. 12(2) Akta.

[2] Kekerasan hukuman yang ditetapkan oleh s. 39A(2)(f) Akta mencerminkan niat Parlimen bahawa sabitan kerana memiliki apa jua dadah terlarang dalam jumlah yang besar hendaklah disetimpalkan dengan hukuman yang akan dijatuhkan berdasarkan fakta sesuatu kes.

[3] Ganja di dalam milik perayu adalah 14 kali lebih berat dari jumlah yang boleh membangkitkan anggapan perbuatan mengedar di bawah s. 37(da)(vi) Akta. Oleh hal yang demikian, menjadi kehendak kepentingan awam bahawa perayu harus dihukum dengan hukuman yang berat sebagai satu amaran kepada yang lain. Hukuman 18 tahun penjara dan 12 kali sebatan adalah adil dan wajar dalam halkeadaan yang wujud.

[Rayuan dibenarkan.]

Case(s) referred to:
Lim Guan Eng v. PP [1998] 3 CLJ 769 ***(refd)***
PP v. Lin Lian Chen [1993] ISCR 159 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), (vi), 39A(2)(f), 39B(1)(a)

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the Public Prosecutor - Hanafiah Zakaria DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-18-96]

Reported by WA Sharif

JUDGMENT

Siti Norma Yaakob JCA:

In the High Court, the appellant was tried and convicted for trafficking in 2863.1 grams of cannabis, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and sentenced to death under sub-s. (2) of the same section.

Before us, he appealed against both his conviction and sentence. The undisputed evidence showed that the offending drug was found in four plastic packages that were placed in an unlocked black bag and that black bag was found unconcealed on the back seat of the car driven by the appellant. The car belonged to the appellant's father but he was alone when the car was stopped and searched by the police.

In the light of such circumstantial evidence we had found that the trial judge had misdirected himself when he ruled that trafficking had been proved. On the contrary we consider that the prosecution evidence merely supports the lesser offence for possession, a finding that Encik Mohd. Hanafiah bin Zakaria, learned Deputy Public Prosecutor for the respondent was prepared to accept as the presence of the drug in the car, *per se*, cannot amount to trafficking. See the case of *PP v. Lin Lian Chen* [1993] ISCR 159.

It was under those circumstances that we had allowed the appellant's appeal against his conviction for trafficking and substituted it to that of being in possession of the dangerous drug under s. 12(2) of the Act, and sentenced him to 18 years imprisonment to take effect from the date of his arrest and 12 strokes of the rotan under s. 39A(2)(f), of the Act.

As the appellant is dissatisfied with the sentence that we had passed on him, this judgment is confined to the reasons why we consider the term of imprisonment and the number of the strokes we had ordered to be just and appropriate.

The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seised with such a jurisdiction is empowered to take into account the following considerations;

(1) the extent and seriousness of the offence committed;

(2) the guilty person's antecedents and

(3) the public interest factor.

See the judgment of this court in *Lim Guan Eng v. Public Prosecutor* [1998] 3 CLJ 769; [1998] 3 MLJ 34.

Mr. Karpal Singh, counsel for the appellant conceded that the amount of cannabis found in the appellant's possession is very large. By way of mitigation he drew our attention to the fact that the appellant was only 29 years old at the time he committed the offence on 14 June 1996 and that he was a first offender.

Under s. 39A(2)(f) of the Act, the maximum punishment upon conviction is life and the minimum is not less than five years and whipping of not less than 10 strokes is mandatory. The severity of the sentence can only be to reflect Parliament's intention that conviction for being in possession of a large amount of any form of prohibited drugs must be commensurate with the sentence to be passed based on the peculiar facts of each case. In this connection the appellant was found to be in possession of 2863.1 grams of cannabis which is 14 times the permitted limit for the presumption of trafficking to arise under s. 37(da)(vi) of the Act. Fortunately for the appellant, the ingredients of the offence of trafficking could not be proven against him. Nevertheless we consider that the substantial amount of cannabis found in his possession must be reflected in the sentence and public interest dictates that he should be severely punished as a deterrent to others who may be minded to behave like him. On that very paramount consideration we consider a term of 18 years and 12 strokes to be a just and appropriate sentence to be imposed on the appellant.